

PAUL J. RIEHLE (SBN 115199)
paul.riehle@faegredrinker.com
**FAEGRE DRINKER BIDDLE & REATH
LLP**
Four Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 591-7500
Facsimile: (415) 591-7510

CHRISTINE A. VARNEY (*pro hac vice*)
cvarney@cravath.com
KATHERINE B. FORREST (*pro hac vice*)
kforrest@cravath.com
GARY A. BORNSTEIN (*pro hac vice*)
gbornstein@cravath.com
YONATAN EVEN (*pro hac vice*)
yeven@cravath.com
LAUREN A. MOSKOWITZ (*pro hac vice*)
lmoskowitz@cravath.com
M. BRENT BYARS (*pro hac vice*)
mbyars@cravath.com
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

*Attorneys for Plaintiff and Counter-
defendant Epic Games, Inc.*

THEODORE J. BOUTROUS JR. (SBN
132099)
tboutrous@gibsondunn.com
RICHARD J. DOREN (SBN 124666)
rdoren@gibsondunn.com
DANIEL G. SWANSON (SBN 116556)
dswanson@gibsondunn.com
JAY P. SRINIVASAN (SBN 181471)
jsrinivasan@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520

VERONICA S. MOYE (*pro hac vice*)
vlewis@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201
Telephone: 214.698.3100
Facsimile: 214.571.2900

CYNTHIA E. RICHMAN (*pro hac vice*)
crichman@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Telephone: 202.955.8500
Facsimile: 202.467.0539

*Attorneys for Defendant and
Counterclaimant Apple Inc.*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

EPIC GAMES, INC.,

Plaintiff, Counter-defendant,

vs.

APPLE INC.,

Defendant, Counterclaimant.

No. 4:20-CV-05640-YGR-TSH

**EPIC GAMES, INC.'S STATEMENT OF
OBJECTIONS TO APPLE EXPERT'S
WRITTEN DIRECT TESTIMONY**

Hon. Yvonne Gonzalez Rogers

Pursuant to the parties' joint stipulation filed on April 27, 2021 (ECF No. 510), Epic Games, Inc. ("Epic") submits the bases for its objections to Apple expert's written direct testimony.

DR. RUBIN'S OPINIONS ARE OUTSIDE THE SCOPE OF HIS EXPERTISE.¹

Epic objects to ¶¶ 7, 82 and 84 of Dr. Rubin's written direct on the basis that they contain opinions outside the scope of his expertise. Dr. Rubin is an expert in the field of computer science. (See Rubin Written Direct Testimony ¶¶ 12-13.) He holds a Ph.D. in Computer Science & Engineering, and he has testified that the expertise he offers in this case is in computer science. (Rubin Dep. Tr. at 11:4-8;35:15-20). In the challenged paragraphs, however, Dr. Rubin offers opinions concerning the "incentives" of third parties to "duplicate Apple's App Review efforts" or to meet the standards of App Review. (Rubin Written Direct ¶ 7, 82, 84) (ECF No. 490-6). Dr. Rubin further discusses third-party stores' "financial model[s]", the extent of their "resources" and their reliance on advertising revenues. (*Id.* ¶ 7, 84.) These opinions relate to economics and marketing, which are outside Dr. Rubin's expertise.

"An expert must be qualified by virtue of his or her 'knowledge, skill, experience, training, or education.'" *Rambus Inc. v. Hynix Semiconductor, Inc.*, 254 F.R.D. 597, 600 (N.D. Cal. 2008) (citing Rule 702 of the Federal Rules of Evidence). Dr. Rubin does not have the experience, training or education to offer an opinion on economics or marketing, and at his deposition he disclaimed the intent to offer an opinion on those topics. (Rubin Dep. Tr. at 35:21-36:17). Accordingly, Dr. Rubin's opinions relating to third parties' incentives to implement particular app review processes, as well as their resources and financial models, should be excluded as beyond the scope of his expertise. See, e.g., *Rambus*, 254 F.R.D. at 604 (finding that an expert in the field of electrical engineering and semiconductor design "lacks the expertise needed to testify about the commercial aspects of this inquiry" and specifically "lacks the

¹ Epic is withdrawing its objections to the written direct testimony of Professor Hitt, and agrees that his written direct testimony may be admitted pursuant to paragraph (1) of the Parties Stipulation and [Proposed] Order Regarding Expert Direct Testimony (ECF No. 510).

1 expertise to explain whether or not advertising, standardization, import laws, contractual
2 relationships, or any of a number of other factors influenced the commercial success” of the
3 defendants’ products); *see also Apple Inc. v. Samsung Elecs. Co.*, 2018, WL 1586276, at *3, *14
4 (N.D. Cal. Apr. 2, 2018) (finding that Apple’s expert, an industrial designer, did “not establish[]
5 that his expertise includes experience with marketing and advertising” and therefore limiting those
6 improper opinions).

7
8 Dated: April 28, 2021

CRAVATH, SWAINE & MOORE LLP

Christine A. Varney (*pro hac vice*)

Katherine B. Forrest (*pro hac vice*)

Gary A. Bornstein (*pro hac vice*)

Yonatan Even (*pro hac vice*)

Lauren A. Moskowitz (*pro hac vice*)

M. Brent Byars (*pro hac vice*)

9
10
11
12 FAEGRE DRINKER RIDDLE & REATH
LLP

Paul J. Riehle

13
14 By: /s/ Gary A. Bornstein

Gary A. Bornstein

825 Eighth Avenue

New York, New York 10019

Telephone: (212) 474-1000

17 *Attorneys for Plaintiff and*
18 *Counter-defendant Epic Games, Inc.*
19
20
21
22
23
24
25
26
27
28